83-685

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MARINE CORPS EXCHANGE;
COMMERCIAL UNION INSURANCE
COMPANY, PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR, ET AL.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

When an employee has suffered two specific injuries to his back, having "average weekly wage" of $178 per week at time of first injury and disputed "average weekly wage" at the time of the second injury, though with salary of $294.38 per week at such time, and as a result of which injuries there is claim of permanent disability predicated upon loss of "wage-earning capacity" within the meaning of §908(c) and (h) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §908(c) and (h):

1. Whether, given a finding that post first injury earnings of $294.38 per week "did not fairly represent post-injury wage-earning capacity" and that as a result of the first injury there was a "50 percent loss of earning capacity at the time of his last back injury," within the meaning of §908(h), it is error for the Court to utilize $294.38 as the

"average weekly wage" and "earning capacity," within the meaning of §910 "at the time of his last back injury" and upon which further loss of wage-earning capacity was again computed.

2. Whether it is error to pyramid awards of permanent disability of 50% and 100% predicated upon loss of earning capacity in the absence of actual loss of earning capacity following the first injury or adjustment of "average weekly wage" at the time of second injury commensurate with the theoretical loss found to be existent at that time.

3. Whether the decision in this case presents conflict between the Circuit Courts and the statutory interpretation and application as set forth by the Circuit Court for the District of Columbia in the case of Hastings v. Earth Satellite Corp., 628 F.2d 85, 14 BRBS 345, cert. denied, 101 S. Ct. 281 (1980).

4. Whether there has been error

and departure from accepted and usual proceedings and abuse of judicial discretion by the Court's assumption of or substitution of findings of fact inconsistent with uncontradicted findings of fact by the trial court and by its failure to address all issues raised.

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PETITION FOR WRIT OF CERTIORARI TO
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Marine Corps Exchange, and its workers' compensation insurance carrier, Commercial Union Insurance Company, petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

Memorandum and Judgment of the U. S. Court of Appeals (App. E, infra, 1e-5e) (not reported through 715 F.2d 580). The Decision and Order of the

Benefits Review Board (App. D, infra, 1d-27d) is reported at 14 BRBS 784.

The Decision After Remand of the Administrative Law Judge (App. C, infra, 1c-8c).

The Decision of the Benefits Review Board (App. B, infra, 1b-21b) is reported at 10 BRBS 442 (1979).

The Decision and Order of the Administrative Law Judge (App. A, infra, 1a-22a).

JURISDICTION

The opinion of the Court of Appeals (App. E, infra, 1e-5e) was entered on August 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The jurisdiction of the Court of Appeals was invoked under 33 U.S.C. 921(c).

STATUTORY PROVISIONS INVOLVED

1. §908(c)(21) and (h) of the Longshoremen's and Harbor Workers' Compensation Act, as amended effective November 26, 1972, 33 U.S.C. 908(c)(21) and (h) provides in part:

"§908. Compensation for Disability. Compensation for disability shall be paid to the employee as follows:

". . . .

"(c) Permanent partial disability: In case of disability partial in character but permanent in quality, the compensation shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section respectively, and shall be paid to the employee, as follows:

". . . .

"(21) Other cases: In all other cases in this class of disability the compensation shall be 66 2/3 per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

". . . .

"(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual

earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future."

2. §910(c) and (d) of the Longshoremen's and Harbor Workers' Compensation Act, as amended November 26, 1972, 33 U.S.C. 910(c) and (d) provides in part:

"§910. Determination of Pay. Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

". . . .

"(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and

fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class of working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

"(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings."

STATEMENT OF THE CASE

The issues herein presented arise out of a claim of industrial injury to the back allegedly occurring to Elton Morgan on August 27, 1976 while he was opening a door and which claim, in conjunction with prior claim, has led to composite award for 150% permanent disability predicated upon loss of wage-earning capacity.

The claim in litigation below was disputed by the employer, Marine Corps

Exchange, and its workers' compensation insurance carrier, Commercial Union Insurance Company, on the grounds that the injury did not occur; that it resulted in no loss of wage-earning capacity and in issues herein presented that award of disability was improperly computed and based on erroneous interpretation and application of statute.

The claim arises pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. as extended by the Nonappropriated Funds Instrumentalities Act, 5 U.S.C. 2105, 8171-8173.

The claim was consolidated for trial with claim of prior injury to the back occurring on April 21, 1969 and which case was titled Elton Morgan v. Marine Corps Exchange, Fireman's Fund Insurance Company, BRB No. 78-266B, 77-LHCA-797-S and OWCP No. 13-11825.

In such case, there are findings, among others, that Morgan, at time of

such injury, had average weekly wage of $178 per week.

Disability compensation under the Longshoremen's and Harbor Workers' Compensation Act is computed based on 66 2/3 per centum of the average weekly wage at time of injury.

The evidence was uncontroverted that Mr. Morgan's back condition, following the 1969 injury, became progressively worse.

By May 1976 his symptoms were so severe that his managerial functions were performed from a bed provided by the employer at the employer's place of business. When not in bed, his supervisor permitted him to remain near the "lounge" where his bed was located. Two women subordinates performed any and all physical aspects of his work. He acknowledged that his own activities from that time forward were limited to decision making activities.

Moran acknowledged that as of May

1976 he would not have been able to go out and find other employment.

As of July 16, 1976, he told his long-time treating physician, Dr. Mitchell, that he felt totally disabled.

On July 20, 1976, Dr. Mitchell recommended to the employer that it process Morgan for medical disability retirement. Such retirement was put in process.

Dr. Mitchell testified that he definitely considered Morgan totally disabled in the open labor market as of such date.

Nevertheless, Morgan continued in his limited capacity and received full salary of $294.38 per week.

On August 27, 1976, Morgan, while opening a sliding door, experienced a sharp pain in his back and left leg.

Approximately six months later he claimed this event constituted a new injury.

He did not work after August 27, 1976.

The petitioners contested the claim. The treating physician, Dr. Mitchell, testified that no new injury occurred; that Morgan merely experienced a recurring symptom of pain stemming from his preexisting pathology, a circumstance to which Morgan agreed in his testimony.

Nevertheless, following trial, the administrative law judge determined that Morgan had sustained injury on August 27, 1976 as claimed. Permanent total disability was awarded, 50% of which was attributable to the first injury and 50% of which was attributable to the second injury.

Petitioners appealed as did all parties including the Director.

Subsequently, the Benefits Review Board remanded the case to the administrative law judge with instructions to make findings of Morgan's loss of earning capacity as of the date of the alleged second injury of August 27, 1976.

The administrative law judge thereafter issued Decision After Remand dated July 30, 1979 in which he concluded in part:

> "Ability to earn, rather than wages actually received is normally the test. . . . Further, although §908(h) does not define the factors upon which such a finding must rest, the nature of his injury; the residuals of his surgery; his physical work restrictions; the fact that he carried out almost one-half of his duties at work while lying down on a lounge; the episodic nature of his discogenic disease; the steady progression of his chronic pain syndrome over a seven year period; and the periodic numbness and tingling in his left leg, constitute a sufficient basis for a finding that claimant's earnings after his April 21, 1969, injury did not fairly represent post-injury wage-earning capacity. . . .
>
> ". . . .
>
> "I find that claimant's earning ability had been diminished by fifty percent at the time of his last back injury as a result of his first accidental back injury of April 21, 1969. . ."

The Benefits Review Board in Decision and Order dated March 29, 1982 determined that as a result of the first injury Morgan

had a permanent disability of 50% equal to $58.66 per week predicated upon 50% loss of average weekly wage of $178 per week equal to $86 times 66 2/3 per centum equals $58.66 per week.

The Benefits Review Board, after affirming the administrative law judge on the issue of injury and in the absence of any finding on the disputed issue of "average weekly wage" at the time of the alleged injury of August 27, 1976, determined that as a consequence of injury of August 27, 1976 Morgan had suffered 100% permanent total disability and awarded compensation based on the computation: 100% times $294.38 per week times 66 2/3 percentum equals $196.23 per week.

Petitioners sought review by the Court of Appeals for the Ninth Circuit claiming, among other things, that the Benefits Review Board erred as a matter of law in utilizing Morgan's actual

salary as the basis for permanent and total disability calculations and in awarding 150% disability to Morgan predicated upon loss of wage-earning capacity due to successive injuries to the same part of the body.

The Court of Appeals affirmed by Memorandum decision dated August 25, 1983.

In so doing, the Court stated in part, beginning at page 2:

> "Finally, Commercial Union argues that the Board erred in awarding Morgan a total permanent disability award for the 1976 injury based on his full 1976 salary. Since the 1969 injury resulted in a fifty percent loss of earning capacity, Commercial Union asserts that the 1976 benefits should be based on only half of Morgan's 1976 salary. We believe that the Benefits Review Board applied the proper standards.
>
> "Although Commercial Union was liable only for the decrease in earning capacity attributable to the 1976 injury, 33 U.S.C. §908(f), the two injuries were separate incidents. The Review Board properly considered them

> separately. The 1969 injury produced a fifty percent reduction in Morgan's earning capacity at that time. By 1976, however, Morgan had received several raises. His duties had changed. His services may well have become more valuable despite his injury. Thus, a new determination of earning capacity was required in order to compute the benefits payable for the 1976 injury. The Review Board found that Morgan's 1976 wages accurately reflected his 1976 wage-earning capacity. . . ." (Emphasis added.)

Indeed, the administrative law judge had determined:

> "I find that claimant's earning ability had been diminished by fifty percent at the time of his last back injury. . ."

The Court of Appeals did not respond to petitioners contention that award of composite 150% total disability predicated upon loss of wage-earning capacity and award of compensation equal to 87% of claimant's last actual weekly salary is contrary to law and its own prior decision.

From such decision, petitioners respectfully pray for petition for certiorari.

REASONS FOR GRANTING THE PETITION

1. Conflict exists between the Circuit Courts in method and rationale in computing loss of "earning capacity" from successive injuries pursuant to the provisions of §908(c)(21) and (h) and §910 of the Longshoremen's and Harbor Workers' Compensation Act.

2. Orderly administration and application of a national system of workers' compensation requires uniform interpretation of the concept of "earning capacity" as contained in provisions (§908(c)(21) and (h)) pertaining to disability computation and provision (§910) pertaining to computation of "average weekly wage," the concept which constitutes the basis for disability computations.

3. The Court of Appeals has departed from accepted and usual judicial proceedings and has abused its discretion by:

(a) Utilizing its own speculation as to facts in place of undisputed findings of

facts;

(b) Assuming existence of findings which are totally contrary to those contained in the record; and,

(c) Failing to address all issues raised in the Petition for Review.

PRESENTATION

1. It is error to determine that actual earnings of $294.38 per week do not fairly represent "wage-earning capacity" and that thus there is a 50% loss of wage-earning capacity as of August 27, 1976 for purposes of computation of permanent disability stemming from prior injury, and then for purposes of computing average weekly wage for subsequent injury occurring on the same date, determining that $294.38 per week is the average weekly wage pursuant to a statute predicated upon the concept of "earning capacity."

In determining the issue of

permanent disability secondary to the 1969 injury, the trier of fact was first faced with the problem that at the time of the 1969 injury, his average weekly wage was $176 per week, and that in the time frame immediately prior to the alleged injury of August 27, 1976, claimant's actual weekly salary was $294.38 per week.

§908(c)(21) states in part:

> "Other cases: In all other cases in this class of disability the compensation shall be 66 2/3 per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise. . ."

Assuming that all the trier of fact had to work with was the two salary rates, there would be no "difference between his average weekly wages and his wage-earning capacity thereafter" despite claimant's profound disability and inability to work in the open labor market. Based upon such provision, claimant would be entitled to nothing.

However, §908(h) speaks to this

dilemma, providing in part:

> "The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) (pertaining to temporary partial disability) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity. . ."

Thus, if the trier of fact determined that $294.38 per week would fairly and reasonably represent his "wage-earning capacity" in the time frame immediately prior to and including August 27, 1976, there would be no statutory basis for awarding permanent disability as a consequence of the first injury.

The statute then goes on to read:

> "Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of the injury, the degree of

> of the physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future."

The trial judge on remand addressed this proviso at the express instruction of the Benefits Review Board which had ordered in its first decision that "Commercial Union will be the liable carrier for 104 weeks of compensation based on claimant's true wage-earning capacity at the time of the second injury."

Pursuant to such instruction, the trial judge on remand then determined:

> ". . .that claimant's earnings after his April 21, 1969 injury did not fairly represent post-injury wage-earning capacity."

Having thus satisfied the proviso of subsection (h), supra, he then determined:

> ". . .I find that claimant's earning ability had been diminished by 50 percent at the time of his last back injury as a result of his first accidental back injury of April 21, 1969. . ."

Yet, the Benefits Review Board in its Decision and Order of March 29, 1982 determined that claimant's "average weekly wage" at the time of his last back injury, August 27, 1976, was in fact $294.38 per week.

§910 of the Act titled "Determination of Pay" at subsection (c) reads in part:

> ". . .such average annual earnings shall be such sum as. . .shall reasonably represent the annual earning capacity of the injured employee."

Subsection (d) provides for average weekly wage to be one fifty-second of annual earnings.

Thus, the same concept of earning capacity pervades both provisions.

Nevertheless, the Courts are herein determining that for purposes of awarding permanent partial disability stemming from a 1969 injury, that $294.38 per week does "not fairly and reasonably represent his wage-earning capacity" as of August 27, 1976, but for determination of "average weekly wage" on such date of

injury, that $294.38 does represent actual earning capacity within the meaning of §910(c).

The underlying theory of the concept of disability as utilized in the Longshoremen's and Harbor Workers' Compensation Act is the "capacity to earn wages," or as the case may be, loss of capacity to earn wages.

The Courts herein have ignored this reality.

The Benefits Review Board in so doing relied on the case of Hastings v. Earth Satellite Corp., 628 F.2d 85, 14 BRBS 345 (D.C. Cir.) cert. denied, 101 S. Ct. 281 (1980) (see Decision and Order of March 29, 1982 commencing at page 9).

However, such Court incorrectly applied the premise and holding of the Hastings decision.

If the Court had followed the premise of the Hastings case, it would have determined that average weekly

wage at the time of the alleged injury of August 27, 1976 was 50% of the actual salary of $294.38 equalling $147.19 which would then have been multiplied by 66 2/3 per centum equal to $98.13.

Hastings suffered two injuries for which permanent disability was claimed. The first occurred on April 1, 1971. It was determined that at the time of that injury his annual salary was $30,000 yielding an average weekly wage of $577.

From this injury, Hastings recovered in part and returned to work on a part-time basis with diminished capabilities, duties and earnings.

He suffered subsequent industrial injury in March of 1974 and thereafter Mr. Hastings was totally disabled.

At the time of the second injury, Hastings' earnings totalled $9,228.80 yielding an average weekly wage of $177.48.

The Court in determining "loss of

wage-earning capacity" attributable to the first injury subtracted $177.48 per week from $577 per week and multiplied the difference by 2/3rds. However, there was a statutory limit to the compensation rate at that time, the maximum being $70 per week.

For purposes of awarding permanent and total disability benefits subsequent to the second injury, the Court utilized the "average weekly wage" of $177.48 and multiplied that sum by 2/3rds.

Mr. Hastings had contended that his permanent and total disability award should have been predicated upon earnings of $30,000 per year, an average weekly wage of $577.

The Court of Appeals disagreed, stating in part:

> "We think, also, that the Board's scheme of concurrent awards for both permanent partial disability (for stroke) and permanent total disability (for the cumulative effects of both stroke and emboli) was appropriate. This conclusion

is compelled by our reasoning in the preceding section of this opinion. In that section, we base compensation for Hastings' permanent-total disability on his diminished earning capacity, not on the $30,000 per year earning capacity he possessed before the stroke. Because compensation for his original loss of earning capacity was already addressed in the permanent partial award, logic and fairness require that the permanent partial disability award continue concurrently with the permanent total award.

"A hypothetical makes this clear. Consider a worker earning $10,000 per year. An accident permanently reduces his earning capacity to $6,000. He is awarded compensation based on the $4,000 dimunition in his earning capacity. A second accident disables him totally. The second compensation award is based on the $6,000 in earning capacity remaining after the first accident. Terminating the first award at the onset of the second would deprive the worker of compensation for the permanent loss of $4,000 in earing capacity. Paying the two awards concurrently, however, compensates him fully. The sum of the two awards reflects the full $10,000 dimunition in earning capacity."

In the instant case, the Court has awarded compensation on the sum of average weekly wage from two successive dates of injury, $178 plus $294.38 for a total of $476.38.

The facts of the Hastings case fits the method of computation of permanent disability set forth in §908(h) predicated upon actual earnings which "fairly and reasonably represent his wage-earning capacity. . . ."

However, the case at bar presents a problem of computation under the subsequent proviso in which "actual earnings do not fairly and reasonably represent his wage-earning capacity. . . ."

To extend the theory of the Hastings decision and to arrive at consistent permanent disability awards, there must be a carry over of the determination of prior loss of wage-earning capacity to the artificially high and unrealistic salary of $294.38 per week.

To follow the rationale of Hastings, the average weekly wage of claimant Morgan at the time of the second injury of August 27, 1976 should be 50% times $294.38 equal to $147.19 times 66 2/3 per centum equal to $98.15 per week.

The finding of 100% permanent disability predicated upon total loss of "wage-earning capacity" arising out of impairment to the back and coupled with concurrent finding of 50% permanent disability, also predicated upon loss of wage-earning capacity, in the absence of commensurate adjustment of "average weekly wage" at the time of second injury commensurate with the theoretical loss found to be existent at that time, constitutes a pyramiding of permanent disability which results in 150% total disability and compensation in fact equal to 87% of claimant's last actual weekly salary. As such, it is contrary to law.

§908(a) provides in part:

> "908. Compensation for Disability. Compensation for disability shall be paid to the employee as follows:
>
> "(a) Permanent total disability: In case of total disability adjudged to be permanent 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability."

In this case, pursuant to the Decision and Order of the Benefits Review Board, claimant is to receive $58.66 as a consequence of the April 1969 injury and $196.23 per week as a consequence of the alleged injury of August 27, 1976 for a total of $254.89 per week which equals 87% of claimant's actual weekly salary as of August 27, 1976.

The Court of Appeals for the Ninth Circuit in the case of Rupert v. Todd Shipyard Corp., 239 F.2d 273 (9th Cir. 1956) determined that there cannot be pyramiding of permanent partial disability nor permanent total disability in excess of 100%. The Court concluded in part:

> "As a compensation statute imposing upon the employer liability regardless of fault,

> the Act should generally be interpreted as providing for an award intended to compensate for loss of earning capacity. Any interpretation permitting an award of compensation for facial disfigurement to be superimposed upon an award for permanent total disability which presupposes a permanent loss of all earning capacity would run counter to the manifest spirit and purpose of the enactment."

The Court of Appeals in its decision has not addressed this issue.

Furthermore, the Court of Appeals in its decision engages in speculation as to facts not contained in the record and immaterial to its decision in that there existed in the record clear-cut indisputable findings of fact on the issue of loss of earning capacity and indeed has assumed findings of fact in that regard which are 180° contrary to that existent in the record.

Petitioners pray that this circumstance be rectified.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

DECISION AND ORDER
OF ADMINISTRATIVE LAW JUDGES
SAN FRANCISCO REGIONAL OFFICE

U. S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

San Francisco Regional Office

In the Matter of	
ELTON MORGAN	
Claimant	CASE NO. 77-LHCA-797-S & 798-S
v.	
MARINE CORPS EXCHANGE	OWCP NO. 13-11825 & 13-0046024
Employer	
and	
FIREMAN'S FUND INSURANCE COMPANY	
Carrier	
COMMERCIAL UNION INSURANCE COMPANY	
Carrier	

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Before: JAMES J. BUTLER
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

Claimant seeks compensation for permanent total disability under the provisions of the Longshoremen's and Harbor Workers' Act (LHWCA), 33 U.S.C. §§901-950 [the Act] as extended to cover certain employees of non-appropriated fund instrumentalities described by 5 U.S.C. §2105(c), Pub. L. 89554, September 6, 1966, 80 Stat. 555, 5 U.S.C. §8171, and the rules and regulations implementing the Act found in Title 20 C.F.R., Parts 701 and 702. The primary issues presented are: (1) the nature and extent of claimant's permanent disability attributable to his low back; (2) whether the whole of claimant's disability may be attributed to one or more injuries, and (3), the applicability, if any, of sections 8(f) and 44 of the Act 33 U.S.C. §§908(f) and 944 (second or subsequent injury provisions of the Act).

Preliminary Discussion, Findings and Conclusions

On April 21, 1969, claimant, age 30, while employed as an Assistant Warehouse Manager for Marine Corps Exchange, Camp Pendleton, California, a nonappropriated fund instrumentality, was in the process of moving boxes of merchandise weighing from twenty-five to thirty pounds when he felt a "pull" in his low back after lifting and twisting in an attempt to set a box down in a confined work area. Claimant continued to work but sought medical aid from his family physician who in turn referred him to Dr. Byron Mitchell, an orthopedic specialist. Dr. Mitchell treated claimant conservatively and claimant continued to work although his low back pain persisted. When claimant's back pain progressively worsened for no apparent reason, Dr. Mitchell certified claimant's disability as temporarily total for the period July 30, 1969 to September 7, 1969. Worker's compensation benefits were paid by Fireman's Fund who was on the risk on the date of the original injury until September 30, 1971, when Commercial Union became the carrier, at

the rate of $70.00 per week.

Claimant continued to work with periodic treatment from Dr. Mitchell until August 25, 1971, when he was admitted to Tri-City Hospital where an EMG (electromyograph, electromyogram) study on September 27, 1971, confirmed Dr. Mitchell's impression of August 25, 1971, which was: ... "disc protrusion, L4-5, with nerve root irritation and compression." A myelogram report also described a large disc protrusion at the fourth lumbar level. An operative report of low back surgery performed by Dr. Mitchell on October 1, 1971, describes a frankly herniated fourth lumbar level.

Following his back surgery, claimant was released to return to work in December of 1971, but was restricted relative to bending, lifting and twisting.

Claimant, after returning to work, continued to suffer from episodes of severe low back pain with left sciatica. These past lumbar laminectomy residuals were severe enough to keep him at bed rest

for a period of many days to a few weeks. As late as early March of 1976, seven weeks were lost, with ten or eleven days of hospitalization. Even when at work, claimant spent three to four hours a day lying on a cot provided him for that purpose by employer where he did paper work and instructed two or more assistants in their work activities.

Reports of neurological evaluations conducted by Dr. Robert A. Nichols on January 7, 1975, and June 3, 1976, indicate that claimant was suffering from intermittent nerve root irritation due to degenerative disc disease in the lumbar spine and that seven years after the onset of symptoms, his condition had progressively become a difficult chronic pain syndrome which was most likely a residuum of the original lumbar disc lesions. After considering Dr. Nichol's last report, Dr. Mitchell was so convinced that claimant was totally disabled from an industrial standpoint that he sent a letter to claimant's employer on July 20, 1976, which read as follows:

> This patient (claimant) has discogenic disease, protrusion of disc and postoperative symptoms and findings which appear to be affecting his work more and more.
>
> Recommendation: That patient apply for medical disability through retirement program.

On August 27, 1976, claimant attempted to open a sliding door at work "... and in so doing felt a very sharp pull and tug in the lower part of the back and very severe pain that radiated clear down ... through the leg and into (his) big toe." Claimant saw Dr. Mitchell three days after this event took place. A report by Dr. Mitchell, dated August 3, 1976, relates the incident of August 27, 1976, as described by claimant immediately above, and indicates that it was recommended that claimant rest, stay off of his feet, continue with home traction, and stay off work. As of August 24, 1977, claimant had still not returned to any gainful employment.

A consultation report by Dr. Rollin Weber, dated October 12, 1976, concludes as follows:

DISABILITY FACTORS:

Subjective factors are limited under present signs and symptoms.

1. Intermittent pain in the low back aggravated by standing, stooping and sitting, relieved by laying down.

2. Limited walking, less than a block.

These would be rated as mild to moderate depending on the level of his activities.

Objective - 1. X-ray narrowing of the 5-S1 disc space.

2. Well healed laminectomy scar low back.

3. Weakness of the extensor hallucis longus on the left.

4. Increased sciatic stretch signs on the left.

5. Decreased sensation over the L5 distribution to pinwheel on the left.

6. Mild atrophy of the quadriceps muscle on the left.

7. EMG findings of positive denervation of L5.

He has sufficient disability resulting in limitation to semi-sedentary work contemplating that he can do work approximately one-half of the time in a standing or walking position with a minimum demand for physical effort whether standing, walking, or sitting.

Dr. Weber was also of the opinion that because of the chronicity and because of his previous surgery and the probable scar tissue, it was doubtful that other surgical procedures would appreciably help the patient or alter the course of his symptoms.

At the hearing, Dr. Mitchell steadfastly held to his previous opinion that claimant's physical condition would be in no way different in the absence of the event relative to the sliding door incident on August 27, 1976. Dr. Mitchell refused to accept the sliding door incident as a new injury in a medical sense as his examination three days after the event disclosed no change in pathology. Instead, Dr. Mitchell felt that claimant's complaints following the sliding door incident were consistent with those made all the way through the case. Dr. Mitchell testified that over the years since the first onset of symptoms there were many similar complaints such as those made after the sliding

door episode and that claimant had described such a "pinching off" on numerous occasions. According to Dr. Mitchell, claimant's complaints following the sliding door incident experience were merely a part of the normal sequence of claimant's pathology which he had followed "all the way through" his case. Dr. Mitchell felt that the same complaints could have just as well been validly related to a precipitating event much less severe in nature or, for that matter, to no particular event whatsoever.

Apparently, it has long been recognized that one of the most characteristic features of lumbar disc lesions is the episodic nature of the various symptoms they produce. This gives rise to diverse medical evaluations depending on the particular occasion the medical examiner happens to see the patient. The fact that claimant presented himself to Dr. Mitchell for aid and advice during acute phases, which were followed in the natural course of events by stages of remission during which other

physicians observed him, no doubt accounts for the varying degrees of the assessments of the impairment present in this particular case. This record demonstrates the medical fact that periodic remissions and exacerbations of symptoms are not always easy to explain in that they do not necessarily appear to be associated with any obvious change in the underlying pathological condition. The temporary aggravations of this condition occasioned by any one or a number of subsequent events merely serve to demonstrate its ever continuing presence.

I also accept Dr. Mitchell's opinion that the injury of April 21, 1969, together with his chronic past-protrusion disc laminectomy syndrome, has caused claimant to lose all physical ability to compete with all others not similarly impaired on the open labor market. It is true that until the sliding door incident on August 27, 1976, he was not economically disabled under the Act (33 U.S.C. §902(10)), insofar as his employer was concerned, but

as to all other employers, he obviously has been permanently and totally disabled from purely an industrial standpoint since the complications of his work-connected injury on April 21, 1969, and his following back surgery required him to spend almost fifty percent of his job time flat on his back. To be sure, there is also a functional element involved in this case, but this overlay is merely a contributing factor in the overall assessment of claimant's disability, real and imagined.

I should also mention that I was assisted in the instant inquiry by the exhaustive post-hearing medical report of Dr. John D. Segel. It was refreshing to discover that Dr. Segel resisted any temptation he might have had to assume an administrative role and evaluate claimant's permanent disability. Instead, he confined his rating to claimant's "permanent impairment" which, unlike "permanent disability," is purely a medical condition. See Guides to the Evaluation of Permanent Impairment, published by the American

Medical Association (1971).

Turning at last to the question whether Section 8(b) of the Act, 33 U.S.C. §908(f) (Supp. V 1975), should be invoked, I am aided, by the recent decision of the United States Court of Appeals for the District of Columbia Circuit in the case, The C & P Telephone Company v. Director, OWCP, 564 F.2d 503, 6 BRBS 399 (August 5, 1977). As will be seen, the factual situation presented in the C & P case is remarkably similar to the one presented here. The court recited the following background to its opinion:

> On October 16, 1972, claimant Mrs. Jacqueline M. Glover filed a claim for workmen's compensation benefits for a back injury sustained on September 23, 1971, at her place of employment by C & P in the District of Columbia when an elevator in which she was riding is alleged to have descended too rapidly from the sixth floor to the first floor causing her to fall to her knees.
>
> Mrs. Glover had a long history of recurring back ailment prior to this accident on September 23, 1971. In 1962, she injured her back when she fell on the street. This injury was sufficiently severe

to require five treatments from a chiropractor, Dr. Angel, and treatment by a physician, Dr. Fitzgerald. She advised C & P that she was unable to work for three days as a result of this accident. Mrs. Glover also sued the District of Columbia to recover for this back injury.

In 1967, Mrs. Glover injured her back again when she fell down her basement steps. She was absent from work and her chiropractor, Dr. Angel, advised C & P that she was absent due to acute lumbosacral strain.

In April, 1968, Mrs. Glover was unable to arise from a chair because of severe back pain. As a result, she was treated for two weeks with traction and pain medication. She missed work for eleven days, and Dr. Traum, her family doctor, advised C & P that she was suffering from "[1] low back syndrome, probable disc syndrome."

In August and September, 1968, Mrs. Glover had a recurrence of back trouble. She suffered a back injury from no indentifiable cause when, in her words, "I just got out of bed one morning and my back was bad." As a result of this back injury, she was hospitalized, x-rayed, and put in traction for several weeks. Dr. Traum advised her to have a myelogram and surgery, but Mrs. Glover was apprehensive.

From August through October, 1968, Mrs. Glover was absent from work 52 days because of back problems. Dr. Traum advised C & P that Mrs. Glover's absence was due to "[a]cute low back

strain, probably disc" and "[a]cute disc syndrome." In November and December, 1968, Mrs. Glover missed 15 days from work because of recurring back trouble.

Mrs. Glover testified that in 1969 she injured her back from no identifiable cause. As she explained "my back just went out again." During the first half of 1969, she worked part-time for 32 days and was absent from work for 10 days due to back trouble.

By June, 1969, Mrs. Glover's absence rate at C & P was so excessive that her supervisor requested that she be examined by C & P's Medical Department. Her supervisor asked the Medical Department:

> I'd like to know if this girl is really able physically to work and if not what would Medical recommend.

The C & P Medical Director reported back to Mrs. Glover's supervisor on July 22, 1969, as follows:

> At the time of this employee's health evaluation examination in the Medical Department at the request of the Commercial Department the significant findings were her marked obesity and the fact that she is wearing a back brace to control a back disorder. There is no doubt that her back condition would improve if she reduced her weight considerably. Certainly, her absence has been excessive, but I am unable to forecast her attendance in the

future. Much will depend on the condition of her back. Unless she can be motivated to bring her weight down to a more average figure, I expect that she will continue to have trouble with her back and consequently, have more absence.

Mrs. Glover's absences from work because of back trouble continued. She testified that in March, 1970 she suffered a back injury while stepping out of her car. Following this accident, Mrs. Glover was out of work 47 days and worked part-time for 27 days. She was placed in traction and medicated. In April, 1970, Dr. Hustead, a neurosurgeon who examined Mrs. Glover, diagnosed that she had a ruptured lumbar disc. Dr. Hustead recommended hospitalization for traction and physical therapy, and if she did not respond to that, he recommended a myelography.

In March, 1971, Mrs. Glover again missed 3 days from work because of back trouble. On September 23, 1971, the elevator accident occurred which gave rise to this compensation claim.

C & P, a self-insured employer, paid Mrs. Glover compensation benefits until October 18, 1973 when C & P controverted the claim on the ground that the elevator accident could not have occurred as described by claimant. C & P continued to pay claimant sickness disability benefits and on October 26, 1974, claimant was retired on a C & P service pension for total disability. In her present claim,

Mrs. Glover sought temporary total disability workmen's compensation benefits from October 18, 1973, reimbursement for medical expenses, and an adjudication of permanent total disability.

In setting aside the order of the Benefit Review Board affirming the Administrative Law Judge's earlier refusal to invoke section 8(f), the court, in part, concluded:

> Thus, the purpose of new §8(f) is to prevent discrimination against handicapped workers in hiring and firing, a discrimination encouraged by the remainder of the Act were it not for §8(f). The Act makes the employer liable for compensation. Hence, the employer risks increased liability when he hires or retains a partially disabled worker. By virtue of the contribution of the previous partial disability, such a worker injured on the job may suffer a resulting disability greater than a healthy worker would have suffered. Were it not for the shifting of this increased compensation liability from the employer to the Special Fund under §8(f), the Act would discourage employers from hiring and retaining disabled workers.
>
> *****
>
> To summarize, the term "disability" in new §8(f) can be an economic disability under §8(c)(21) or one of the scheduled losses specified in §8(c)(1)-(20), but it is not limited to those cases alone. "Disability" under new §8(f) is necessarily of

sufficient breadth to encompass those cases, like that before us, wherein the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability.

*****

New §8(f) also requires that the employee's total permanent disability "not *** be due solely to that [second] injury." The ALJ apparently concluded that the elevator accident was the sole cause of Mrs. Glover's total disability. Again, there is no substantial evidence to suppor that view. Dr. Hustead's agreement that the elevator accident was "the competent producing cause" is at best ambiguous. If Dr. Hustead meant that the elevator accident precipitated the total disability the testimony of all three medical experts is uniform that Mrs. Glover's present total disability is the accumulation of everything that ever happened to her back. The evidence establishes that the elevator accident was not the sole cause of, but just the final event in a long chain of events leading up to Mrs. Glover's present total disability.

The Director further argues that §8(c) can never be applied in an aggravation case, contending that the subsection applies only when two unrelated injuries combine. The legislative purpose, however, would be frustrated by such an artificial distinction. Properly

interpreted, new §8(f) must apply regardless of whether the second injury is of a nature unrelated to that of a previous disability. We note, also, that coverage under §8(f) has been allowed in an aggravation cases. See Atlantic & Gulf Stevedores, Inc. v. Director, Office Workers' Compensation Programs, supra; Nacirema Operating Co. v. Benefits Review Board, supra; Pittston Stevedoring Corp. v. Hughes, 198 F. Supp. 657 (E.D.N.Y. 1961); Vandever v. Voris, 147 F. Supp. 447 (S.D. Tex. 1956).

In summary, we hold that the requirements of new §8(f) have been satisfied in this particular case. Accordingly, we grant C & P's petition and set aside that portion of the Board's order which refused to invoke §8(f).

Ultimate Findings and Conclusions

After considering the whole record in light of the rationale of the C & P case, set out in its most pertinent parts above, I find that the sliding door incident on August 27, 1976, precipitated claimant's total incapacity to earn the wages he was receiving on that date. 33 U.S.C. §902(10). I find that claimant's present total "disability," as that term is defnied by the Act, is due to the cumulative effects of everything that ever happened to his back beginning with the

lifting and twisting incident on April 21, 1969, and ending with the sliding-door episode on August 27, 1976. I expressly find that the sliding-door incident on August 27, 1976, was not the sole cause of, but just the final event in a chain of major and minor events leading up to claimant's present absolute inability to perform even the limited physical tasks required of him in his last employment. I further find that Fireman's Fund Insurance Company is the carrier exclusively responsible for all compensation payments, including costs of related medical aid and services under Section 7 of the Act, 33 U.S.C. §907(a) (Supp. V 1975), for the period April 21, 1969 through August 27, 1976, and that both Fireman's Fund and Commercial Union Insurance Company are the carriers equally responsible for all compensation payments for permanent total disability for the period beginning August 28, 1976, and ending August 27, 1978. Still further, I find that both Fireman's Fund and Commercial Union shall jointly furnish all such medical

aid, services and supplies for such period as the nature of claimant's disability may require from August 27, 1976, and in the future.

Order

Finding and concluding that claimant is presently permanently and totally disabled and that section 8(f) of the Act, 33 U.S.C. §908(f) (Supp. V 1975) should be invoked in partial relief of employer and the carriers, it is hereby ordered:

1. That Fireman's Fund pay all outstanding costs for medical aid, services and supplies incurred by claimant on account of his injury of April 21, 1969, for the period beginning with that date and ending August 26, 1976, inclusive;

2. That Fireman's Fund reimburse claimant in a lump sum for all costs of medical aid, services and supplies, including the costs of the placement of his neurostimulator, incurred and paid by him on account of his injury of April 21, 1969, during the period beginning on the date of said injury and ending August 26, 1976;

3. That the payments due claimant for his permanent total disability for the period August 28, 1976 to the present shall be paid to him in a lump sum to which Fireman's Fund and Commercial Union shall have contributed in equal parts, at the stipulated rate of compensation of $196.24 per week, plus the statutory increases when due, together with interest at rate of six percent per annum and, in addition, a sum equal to ten percent of the total amount due, less interest as required by section 14(e) of the Act, 33 U.S.C. §914(e);

4. That following the payment of the lump sum contemplated immediately above, compensation payments due claimant shall be paid by Fireman's Fund and Commercial Union in equal shares or alternating installments at the rate of $196.24 per week, with statutory increases when due, until August 28, 1978, when compensation payments shall be paid at the rate out of the Special Fund established by section 44 of the Act, 33 U.S.C. §944 (Supp. V 1975);

5. That beginning August 27, 1976, Fireman's Fund and Commercial Union shall share in the costs of all medical aid, services and supplies for such period as the nature of claimant's disability or the process of recovery might require; and,

6. That an attorney's fee, including costs, of $2,558.00 is hereby approved and ordered paid to claimant's counsel, O'Jeno and Webster, Attorneys at Law.

/s/
JAMES J. BUTLER
Administrative Law Judge

Date: February 9, 1978
San Francisco, California
JJB:tl

APPENDIX B

DECISION
OF BENEFITS REVIEW BOARD

U. S. DEPARTMENT OF LABOR

BENEFITS REVIEW BOARD

ELTON MORGAN Claimant v. MARINE CORPS EXCHANGE Employer COMMERCIAL UNION INSURANCE COMPANY Carrier-Petitioner Cross-Respondent FIREMAN'S FUND INSURANCE COMPANY Carrier-Respondent Cross-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner v. MARINE CORPS EXCHANGE Employer COMMERCIAL UNION INSURANCE COMPANY Carrier-Respondent	Filed as Part of the Record Apr 30, 1979 (date) Agnes Kurtz Clerk Benefits Review Board BRB Nos. 78-266 & 78-266A & 78-266B DECISION

FIREMAN'S FUND)
INSURANCE COMPANY)
)
Carrier-Respondent)

Appeals from the Decision and Order of James J. Butler, Administrative Law Judge, United States Department of Labor.

Stephen W. Webster (O'Leno & Webster) San Marcos, California, for the claimant.

William H. Taylor, San Diego, California, for Commercial Union Insurance Company.

Donald M. Clark, National City, California, for Fireman's Fund Insurance Company.

Linda L. Carroll (Carin Ann Clauss, Solicitor of Labor, Laurie M. Streeter, Associated Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, Chairman, MILLER and KALARIS, Members.

MILLER, Member:

These are appeals by the employer and its present carrier, its former carrier and the Director, Office of Workers' Compensation Programs, from a Decision and Order (77-LHCA-797-S & 798-S) of Administrative Law Judge James J. Butler pursuant to the

provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq., as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 et seq. (hereinafter, the Act).

Elton Morgan was employed as an assistant warehouse manager by the Marine Corps Exchange, a nonappropriated fund instrumentality. On April 21, 1969, claimant sustained an injury to his back during the course of his employment. The injury resulted in a lumbar laminectomy being performed October 1, 1971. Voluntary compensation for temporary total disability and medical benefits were paid by the Fireman's Fund Insurance Company (hereinafter, Fireman's Fund), the carrier on the risk at the time of the injury.

Claimant was released for work in December of 1971. However, an extremely bad back condition remained. Periodic medical treatment was necessary. Claimant was required to reduce the frequency of his walking

up and down steps. He was further restricted from bending, stooping and lifting heavy items. Claimant generally spent three to four hours of each work day lying on his back for relief. Employer also provided a lounge for claimant to lie on. Claimant often performed the administrative portions of his work, including directing employees under his supervision, from this position.

Claimant performed his work in this manner for a number of years. Fireman's Fund paid all medical expenses and voluntarily tendered compensation for temporary total disability whenever claimant was absent from work due to the injury. On August 27, 1976, claimant tried to open a sliding door while at work. This incident caused claimant such severe pain that he fell on his knees. Three days later, claimant reported this incident to Dr. Byron W. Mitchell, his treating physician. Claimant has not returned to work after this incident. Claimant sought compensation for permanent

total disability based on this incident. The claim was filed against both Fireman's Fund and Commercial Union Insurance Company. Fireman's Fund denies liability for compensation or benefits after the 1976 incident. On October 1, 1971 Fireman's Fund ceased to be the carrier on the risk, being succeeded by Commercial Union Insurance Company (hereinafter, Commercial Union).

An evidentiary hearing was held in San Diego, California on August 24, 1977. The administrative law judge framed the issues as follows: "(1) the nature and extent of claimant's permanent disability attributable to his low back; (2) whether the whole of claimant's disability may be attributed to one or more injuries, and (3) the applicability, if any, of Sections 8(f) and 44 of the Act, 33 U.S.C. §§908(f) and 944 (second or subsequent injury provisions of the Act)."

The administrative law judge found that the August 27, 1976 incident was an injury within the meaning of the Act which

rendered the claimant permanently and totally disabled. He found the sliding door incident was not the sole cause of claimant's disability, "but just the final event in a chain of major and minor events leading up to the claimant's present absolute inability to perform even limited physical tasks required of him in his last employment." The administrative law judge found that Fireman's Fund was liable for claimant's medical costs under Section 7 of the Act, 33 U.S.C. §907(a), from April 21, 1969 to August 27, 1976; that Commercial Union and Fireman's Fund were equally liable for all necessary medical treatment resulting from the 1976 injury and compensation benefits for permanent total disability following the 1976 injury. He also concluded that Section 8(f) of the Act, 33 U.S.C. §908(f), operated to limit compensation liability from the 1976 injury to 104 weeks.

Commercial Union has appealed contending that there is not substantial evidence in the record as a whole to support the

conclusion that claimant sustained a new injury on August 27, 1976. Alternatively, it argues that the incident of August 27, 1976 was not of such magnitude to produce a fifty percent of the permanent total disability because prior to the incident claimant was already permanently and totally disabled to the extent that he was unable to compete for employment in the open labor market. It also contends the alleged "injury" in 1976 did not cause a need for an award of medical treatment inasmuch that claimant's treating physician testified "that there was no change in symptoms, complaints, findings or diagnosis following alleged event of August 27, 1976."

The Director also appeals alleging that the 1976 incident was not an injury within the meaning of the Act. Alternatively, he argues that if the subsequent incident is determined to be an injury within the meaning of the Act, then it was error for the administrative law judge to apportion the liability between carriers.

Fireman's Fund also appeals contending that inasmuch as claimant sustained an injury on August 27, 1976, Commercial Union should be liable for all the resulting disability. Moreover, Fireman's contends that if the administrative law judge's apportionment of the award is affirmed, it should only be held liable for the pre 1972 maximum compensation of $70.00 per week.

In reviewing a case, the Board is required to affirm the Decision and Order of the administrative law judge when it is supported by substantial evidence, is not irrational and is in accordance with law. 33 U.S.C. §921(b)(3); O'Keefe v. Smith Associates, 380 U.S. 359 (1965). Moreover, it is solely within the administrative law judge's discretion as trier-of-fact to accept or reject all or any part of testimony. Banks v. Chicago Grain Trimmers, 390 459 (1968). The Board must also respect his evaluation of the credibility of all witnesses, including medical witnesses. John W. McGrath Corp. v. Hughes, 289 F.2d 403

(2nd Cir. 1961). Moreover, the fact-finder is entitled to weigh the medical evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (5th Cir. 1962).

Section 2(2) of the Act, 33 U.S.C. §902(2), defines an "injury" as an accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment. 33 U.S.C. §902(2). The Court in Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968), interpreting this language concluded that if something goes wrong within the human frame, there has been an injury within the meaning of the Act. Similarly, Larson speaking in terms of general workmen's compensation

law notes:

> In common speech the word 'injury,' as applied to a personal injury to a human being, includes whatever lesion or change in any part of the system produces harm or pain or a lessened facility of the natural use of any bodily activity or capability.

1B A. Larson, The Law of Workmen's Compensation, §42.11, (1978) citing Burns' Case, 218 Mass. 8, 105 N.E. 601 (1914).

Considering these principles, we affirm the finding that the occurrence of August 27, 1976 was an injury within the meaning of the Act.

Commercial Union and the Director strongly rely on the testimony of Dr. Mitchell who was closely connected to this case. Dr. Mitchell conducted claimant's lumbar laminectomy and served as treating physician until the December 2, 1976. He testified that the complaints for which he treated claimant after the 1971 surgery were no different than the complaints exhibited after the 1976 incident. Dr. Mitchell referred to the sliding door incident as an aggravation of the back

condition. However, by aggravation he meant "that there is an increase of his symptoms, a sharpening of his symptoms, exacerbation of them, this type of thing." Distinguishing this condition from an injury, he noted "if I have an arm that is fractured or broken, I set the arm, put a cast on it. The patient may hit that or hit it against the chair or something else. It does not change the pathology underneath there, but it may increase his pain; it may intensify, may disable him for a while, but actually does not in the true term of 'aggravation' aggravate this or change the pathology..." (Tr. at 162).

Dr. Segel also examined the claimant on August 29, 1977. His 14 page report indicates a detailed review of the medical evidence involved in the case including Dr. Mitchell's testimony. In rebuttal to Dr. Mitchell's evaluation, he noted that in a similar incident when claimant complained of pain while getting out of a chair, Dr. Mitchell reported the increased symptoms as a reinjury. Dr. Segel also noticed the

reports that after the 1971 surgery there were numerous occasions of increased symptoms requiring treatment or hospitalization. The doctor indicated that the events surrounding the time periods of these increased symptoms were probably aggravations of the original injury. Thus the doctor concluded, that claimant's present impairment is due to the repetitive aggravation that has occurred throughout, including and culminating with the August 1976 injury.

The administrative law judge seems to have found Dr. Mitchell's testimony argumentative and perhaps more concerned with legal than medical evaluation. The judge noted his preference for the report of Dr. John D. Segel because "he confined his rating to claimant's 'permanent impairment' which, unlike 'permanent disability,' is purely a medical question."

Within his discretionary authority, the administrative law judge gave more weight to the opinion of Dr. Segel. His conclusion that an injury took place is supported by

substantial evidence. Accordingly, his finding that an injury occurred on August 27, 1976, is affirmed.

Further, we reject the arguments by Commercial Union and the Director that no injury could take place in August 1976 inasmuch as claimant was already permanently disabled in an economic sense prior to the August 1976 incident.

In support of this argument, Commercial Union notes the administrative law judge's acknowledgment that when considering the open labor market, claimant was totally disabled before the 1976 accident. Moreover, the record reveals that as late as July 20, 1976, Dr. Mitchell recommended medical disability through the retirement program. This doctor testified at the hearing that claimant was totally disabled before the August 1976 accident. The Director also notes that the fact that a claimant's employer was beneficent permitting claimant to "work" and to obtain a salary does not negate the existence of permanent total disability

before the 1976 accident. In support, the parties cite Haughton Elevator Co. v. Lewis, 5 BRBS 62, BRB No. 75-308 (Nov. 14, 1976), aff'd, 572 F.2d 477 (4th Cir. 1978). In Lewis the injured claimant was dismissed by his employer for refusing to do heavy work in his injured condition. However, his economic situation was so bad that despite the excruciating pain, claimant turned to other employment. The Board held that claimant made an extraordinary effort to work, and regardless of this other employment, he was totally disabled.

Lewis is not a case concerning a beneficient employer. Indeed, it was the lack of a beneficent employer that forced Lewis to work under extraordinary circumstances. Claimant in the instant case was not making such an extraordinary effort as was Lewis to continue his employment. Unlike Lewis, claimant's employer took claimant's problem into consideration and provided the necessary comforts to protect claimant from laboring under any extraordinary pain.

More significantly, in the case of the benevolent employer, disability is generally found because the wages received by the injured worker are not merited by the services rendered. Thus, either in whole or in part, the work ostensibly performed is of little benefit to employer. Twin Harbor Stevedoring & Tug Co. v. Marshall, 103 F.2d 513 (9th Cir. 1939). All the indications in the record in this case show that claimant's performance bore some useful and necessary function for employer. Clearly it cannot be said that claimant was totally disabled before the 1976 accident. See Van Dyke v. Newport News Shipbuilding and Dry Dock Co., 8 BRBS 388, BRB No. 77-926 (May 31, 1978).

We also reject Commercial Union's third argument that because Dr. Mitchell testified that there was no change in claimant's symptoms, there should be no liability for medical benefits. The argument is based on Dr. Mitchell's theory that the accident of 1976 was not an injury. We have rejected this view. Accordingly, Commercial Union is

liable for medical benefits after the 1976 injury.

Fireman's Fund and the Director argue that the administrative law judge erred in apportioning liability between the two carriers. Under the Act, an employer is absolutely liable for work-related injuries. 33 U.S.C. §§904, 905. The carrier by providing compensation insurance under the Act becomes bound for the full obligation of the employer. 33 U.S.C. §935; 20 C.F.R. §703.115. At the time of the injury at issue Commercial Union was the only carrier under the "full obligation." Therefore, it alone is liable for the full effect of that injury. The injury in this case includes the aggravation of any pre-existing condition. Wheatley v. Adler, supra; Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966). Employer and hence the carrier on the risk is responsible for the entire resultant disability. Accordingly, the Decision and Order is reversed with respect to assessing fifty percent of the compensation award and

medical benefits to claimant beginning August 27, 1976 against Fireman's Fund.

However, this is not to say that no permanent partial disability existed before the 1976 injury for which Fireman's Fund should be held liable. The issue of permanent partial disability due to the 1969 injury was clearly before the administrative law judge at the hearing below. Tr., p. 11. However, his decision and order fails to specifically address this question. Since the evidence of record on this issue is both extensive and conflicting, this Board cannot resolve the conflict concerning the question of whether the claimant was able to fully earn his wages from the employer prior to the 1976 injury or whether those wages flowed, at least in part, from the beneficence of the employer. To the extent that on August 27, 1976 claimant was earning at least part of his wages, he had a wage-earning capacity. This wage-earning capacity was totally destroyed by

the injury of that date. As the Director points out, Fireman's is liable for any disability flowing from the 1969 injury, including the effects of the 1971 surgery.

The case must be remanded for a finding on the nature and extent of partial disability, if any, flowing from the 1969 injury. The nature and extent, however, must be determined by the trier of fact. O'Keeffe, supra.

Such a finding is also essential for appropriate determination of Commercial Union's liability. Upon remand, a finding on the reduced wage-earning capacity caused by the 1969 injury, if any, is to be made. It is upon claimant's remaining wage-earnin- capacity at the time of the 1976 injury that a permanent total disability award should be based.

The Director further contends that Section 8(f) of the Act, the second injury provision, does not apply in this case. Under Section 8(f) employer's liability is limited if an employee is injured and the injury combines with a preexisting disability

to form a permanent disability. The Congressional design is to prevent employers from discriminating against workers who, as a result of previous handicap, may present an extra risk. Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198, 202 (1949). For employer to be benefitted by Section 8(f), it must show that the claimant's disability was not due solely to the work-related injury but was contributed to by an "existing permanent partial disability." See C & P Telephone Co. v. Director, OWCP, 504 F.2d 503 (D.C. Dir. 1977).

The Director's argument must be rejected because it is based on two contentions which have already been rejected: that there was no injury in combination with a preexisting disability because no injury occurred on August 27, 1976 and, that based on the Lewis case, claimant's permanent total disability was solely due to the 1969 injury. Therefore, we affirm the administrative law judge's conclusion that the 1969 injury amounted to a preexisting permanent

partial disability under Section 8(f). Moreover, it was the cumulative effects of the 1969 injury, culminating in the 1976 injury, that caused claimant's permanent total disability. Therefore, Section 8(f) of the Act is applicalbe here. C & P Telephone, supra.

As we have determined that Commercial Union is responsible for the full effects of the 1976 injury, it also follows that Section 8(f) relief is available only for Commercial Union.

The Board notes that claimant's counsel has submitted a request for a fee for services rendered on behalf of the claimant before the Board. Since we have determined that a remand of this case is necessary, the Board will take no action upon the fee request at this time. Claimant's counsel is granted leave to refile his request following the completion of this case pursuant to our order of remand.

Accordingly, the finding by the administrative law judge that an injury occurred on August 27, 1976 is affirmed.

The Decision and Order is reversed regarding the apportionment of liability between the carriers for medical expenses and compensation benefits flowing from the 1976 injury. Commercial Union is the carrier liable for medical expenses and for all disability following the 1976 injury. Finally, the case is remanded for determination of claimant's wage-earning capacity before the 1976 injury but after the 1969 injury and surgery. If any permanent partial disability is found to have existed prior to the 1976 injury, Fireman's Fund is the liable carrier for continued benefits. Commercial Union will be the liable carrier for 104 weeks of compensation based on claimant's true wage-earning capacity at the time of the second injury.

/s/
JULIUS MILLER, Member

We concur:

/s/
SAMUEL J. SMITH, Chairman

/s/
ISMENE M. KALARIS, Member

Dated this 30th day of April, 1979.

APPENDIX C

DECISION AFTER REMAND
OF ADMINISTRATIVE LAW JUDGES
SAN FRANCISCO REGIONAL OFFICE

U. S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

San Francisco Regional Office

In the Matter of	
ELTON MORGAN	
Claimant	CASE NOS. 77-LHCA-797-S & 77-LHCA-798-S
v.	
MARINE CORPS EXCHANGE	OWCP NOS. 13-11825 & 13-0046024
Employer	
FIREMAN'S FUND INSURANCE COMPANY	
Carrier	
COMMERCIAL UNION INSURANCE COMPANY	
Carrier	

DECISION AFTER REMAND

The Benefit Review Board has remanded this matter with the directive that I measure the extent of claimant's loss in wage-earning capacity suffered as a result of his accidental back injury on April 21, 1969, and the corrective surgery which followed. 10 BRBS 442.

This claim for compensation benefits was made under the provisions of the Long-

shoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901-948a (hereinafter referred to as "the Act"), as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §§8171-8173. All of the following code section references, however, are to 33 U.S.C.

Subsection (h) of §908 directs that "wage-earning capacity" of an injured employee

> ...shall be determined by his actual earnings if such earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

There can be no doubt but that claimant's earning capacity was seriously and permanently impaired as a result of his severe back injury at work on April 21, 1969. Following his back surgery in October of 1971, claimant returned

once more to his job as Assistant Warehouse Manager for the employer named herein in December of the same year. Although restricted relative to bending lifting and twisting, claimant continued to suffer from episodes of severe low back pain with left sciatica. These post lumbar laminectomy residuals were severe enough to keep him at bed rest for periods of several days to a few weeks. As late as early March of 1976, some six months before his last back injury on August 27, 1976, seven weeks were lost, with ten or eleven days of hospitalization. Even when at work, claimant spent three to four hours a day lying on a lounge provided him by his employer where he did paper work and instructed two or more assistants in their work activities.

A report of neurological evaluations conducted by a Dr. Robert A. Nichols on January 7, 1975, and June 3, 1976, indicated that claimant was suffering from intermittent nerve root irritation due to degenerative disc disease in the lumbar spine

and that seven years after the onset of symptoms, his condition had progressively become a difficult chronic pain syndrome which was most likely a residium of the original lumbar disc lesions. After considering Dr. Nichol's last report, a Dr. Bryon Mitchell, an orthopedic specialist, was so convinced that claimant was totally disabled from an industrial standpoint that he sent a letter to claimant's employer on July 20, 1976, which read as follows:

> This patient (claimant) has disogenic disease, protrusion of disc and postoperative symptoms and findings which appear to be affecting his work more and more.
>
> Recommendation: That patient apply for medical disability through retirement program.

Notwithstanding claimant's vividly demonstrated disability, his employer continued to retain his services at his regular salary until August 27, 1976, when claimant suffered another accidental injury to his back while attempting to open a sliding door at work. The disability due solely to this last injury in combination

with his pre-existing disability, has permanently and totally disabled claimant.

In determining claimant's loss of wage-earning capacity due to his injury of April 21, 1969, and the post-lumbar laminectomy residuals previously alluded to, the actual wages received after the injury and surgery, while evidence of earning capacity, are not conclusive one way or another. "Ability to earn, rather than wages actually received is normally the test." Twin Harbor Stevedoring & Tug Co. v. Marshall, 103 F.2d 513, 515 (9th Cir. 1939). Further, although §908(h) does not define the factors upon which such a finding must rest, the nature of his injury; the residuals of his surgery; his physical work restrictions; the fact that he carried out almost one-half of his duties at work while lying down on a lounge; the episodic nature of his discogenic disease; the steady progression of his chronic pain syndrome over a seven year period; and the periodic numbness and tingling in his left leg, constitute a

a sufficient basis for a finding that claimant's earnings after his April 21, 1969, injury did not fairly represent post-injury wage-earning capacity. Lumber Mutual Casualty Insurance Co. v. O'Keefe, 217 F.2d 720, 723 (2nd Cir. 1954).

Having found that claimant's earnings following his injury on April 21, 1969, did not fairly represent his earning capacity, I am authorized to make a finding reflecting those factors stated in the proviso to §908(h); viz., the nature of the injury (including the residuals of any surgery occasioned by the injury), the degree of physical impairment; the claimant's usual employment, and the effect of the disability in terms of claimant's future.1/

In view of the mechanical strain of April 21, 1969, which profoundly affected

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1/In considering the above factors insofar as they relate to claimant loss of wage earning capacity, I have admitted claimant's Exhibit 5(a) and have taken it into account the information set forth therein when applicable.

what was most probably an already abnormal disc at some stage of the pathological cycle; the degree to which claimant's back condition had progressed as a result of a chain of major and minor events, including some which occurred after Fireman's Fund went off the risk on September 30, 1971, and Commercial Union assumed liability, particularly the event which triggered the seven weeks loss of work and ten or eleven days of hospitalization in early March of 1976; his age (33) at the time the final event took place on August 27, 1976; his high school education; his training and experience as a supervisor in a large warehouse; his seniority on the job; the indication that he was next in line for the manager's position; his prior ability to conduct a major portion of his work activity without walking, standing or lifting; and the effect of the back disease as it would have naturally extended into the future had the incident of August 27, 1976, not intervened, I find that claimant's earning ability had been diminished by fifty percent at the time

of his last back injury as a result of his first accidental back injury of April 21, 1969, and the residuals thereof, including surgery. The responsibility of the two carriers should accordingly be apportioned within the limits of the liability of the employer for whom they substituted. §§908(f)(1), 935 (Supp. V 1975).

/s/
JAMES J. BUTLER
Administrative Law Judge

DATED: July 30, 1979
San Francisco, California

JJB/tab

APPENDIX D

DECISION AND ORDER
OF BENEFITS REVIEW BOARD

BENEFITS REVIEW BOARD

U. S. DEPARTMENT OF LABOR

No. 79-570
& 79-570A PUBLISHED
& 79-570B
& 79-570C

ELTON MORGAN Claimant v. MARINE CORPS EXCHANGE Employer COMMERCIAL UNION INSURANCE COMPANY Carrier FIREMAN'S FUND INSURANCE COMPANY Carrier DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-In-Interest	Filed as part of the record MAR 29 1982 /s/ AGNES KURTZ (Clerk) Benefits Review Board DECISION AND ORDER

Appeals from the Decision and Order After Remand of James J. Butler, Administrative Appeals Judge, United States Department of Labor.

Stephen W. Webster (O'Leon & Webster), San Marcos, California, for the claimant.

William H. Taylor (Taylor, Jones & Wilson), San Diego, California, for employer and Commercial Union Insurance Company.

Donald M. Clark, National City, California, for Fireman's Fund Insurance Company.

Catherine Giacona (T. Timothy Ryan, Jr., Solicitor of Labor, Donald S. Shire, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: RAMSEY, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

MILLER, Administrative Appeals Judge:

These are appeals by the claimant, the employer and its present carrier, its former carrier, and the Director, Office of Workers' Compensation Programs from a Decision and Order After Remand (77-LHCA-797-S & -798-S) of Administrative Law Judge James J. Butler pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq., as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 et seq. (hereinafter, the Act).

The facts in this case were thoroughly discussed in the Board's previous Decision and Order, see Morgan v. Marine Corps Exchange,

10 BRBS 442 (1979); thus, only a brief recapitulation of the facts is warranted herein.

On April 21, 1969, claimant injured his back in the course of his employment.1/ Claimant underwent a lumbar laminectomy in October 1971. Fireman's Fund Insurance Company (hereinafter, Fireman's Fund), the carrier at risk at the time of the injury, paid voluntary compensation for temporary total disability and medical costs.2/

Claimant returned to work in Decmeber 1971. He continued to have an extremely bad back condition. Claimant was required to reduce the frequency of climbing stairs and was restricted from bending, stooping, and lifting heavy items. Claimant spent three to four hours a day lying down,

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1/ Claimant was an assistant warehouse manager for Marine Corps Exchange, a nonappropriated fund instrumentality.

2/ Fireman's Fund ceased to be the carrier at risk on October 1, 1971.

during which time he performed the administrative portions of his work. This working arrangement continued for several years. When claimant was absent from work because of the back injury, Fireman's Fund voluntarily paid temporary total benefits.

On August 27, 1976, claimant felt severe pain when he tried to open a sliding door at work. Claimant has not returned to work since this incident.

Claimant seeks compensation benefits for permanent total disability against both Fireman's Fund and Commercial Union Insurance Company (hereinafter, Commercial Union). Commercial Union was the insurer at risk at the time of the August 1976 incident.

The administrative law judge held that claimant was permanently partially disabled as a result of an April 21, 1969, work-related injury and was subsequently permanently totally disabled as a result of an August 27, 1976, work-related injury. The administrative law judge apportioned liability equally between the two insurers.

The Board affirmed the administrative law judge's finding that claimant's permanent partial disability was aggravated by the August 1976 work incident, resulting in claimant becoming permanently totally disabled. The Board reversed the administrative law judge's apportionment of liability between the two carriers and remanded with instructions to determine the nature and extent of disability, if any, flowing from the 1969 injury. The Board further instructed that claimant's permanent total disability award should be based on claimant's remaining wage-earning capacity at the time of the 1976 injury. See Morgan.

On remand, the administrative law judge found that claimant suffered a 50 percent loss of wage-earning capacity as a result of the 1969 injury.

All of the parties have appealed from the Decision and Order on Remand. Employer and Commercial Union appeal to the Board, contending that the administrative law judge's

finding that claimant was not permanently totally disabled after the April 1969 injury is not supported by substantial evidence in the record as a whole. Commercial Union asserts that claimant had a zero wage-earning capacity after the 1969 incident and that there is not substantial evidence to support the administrative law judge's determination that claimant had a 50 percent loss of wage-earning capacity resulting from his permanent partial disability.

The Director, Office of Workers' Compenation Programs (hereinafter, the Director) appeals, asserting that claimant was permanently totally disabled before the 1976 incident and that there was, therefore, no second injury which would invoke the liability of the Special Fund. 33 U.S.C. §908(f). Alternatively, the Director contends that the administrative law judge erred in failing to compute a specific dollar amount for the permanent partial and permanent total disability awards. The

Director also argues that Commerical Union's liability and the Special Fund's liability should be based on claimant's average weekly wage at the time of the second injury and not on claimant's wage-earning capacity at the time of the second injury.

Claimant also appeals from the Decision and Order on Remand, contending that the administrative law judge erred in making a percentage apportionment for claimant's loss of wage-earning capacity. Claimant has also petitioned to the Board for an attorney's fee.

Fireman's Fund contends that liability for any permanent partial disability benefits is limited to the pre-amendment weekly compensation maximum of $70 and an aggregate pre-amendment compensation maximum of $24,000. See 33 U.S.C. §906(b) (1970) (amended in 1972); 33 U.S.C. §914(m) (1970) (amended in 1972). Fireman's Fund also contests the application for costs, although it deferred to the Board for a determination of the propriety and reasonableness of the attorney's fee.

The Board must affirm the Decision and Order After Remand if it is supported by substantial evidence in the record as a whole, is rational, and is in accordance with law. See generally O'Keeffe v. Smith, Hinchman & Gryllis Associates, Inc., 380 U.S. 359, (1965); 33 U.S.C. §921(b)(3).

I

We turn first to the assertions by Commercial Union and the Director that the administrative law judge erred in finding that claimant was not permanently totally disabled as the result of the 1969 injury and Director's argument that the Special Fund is not liable for any disability resulting from the 1976 incident since there is no second injury and/or since claimant was totally disabled by the first injury.

The Board addressed these arguments in its previous Decision and Order, wherein the Board held that "[a]ll the indications in the record in this case show that claimant's

performance bore some useful and necessary function for employer. Clearly it cannot be said that claimant was totally disabled before the 1976 accident." Morgan v. Marine Corps Exchange, 10 BRBS at 447. This finding constitutes the law of the case and must govern the determination herein. See United States v. United States Smelting, Refining & Mining Co., 339 U.S. 186 (1950); McNeil v. Prolerized New England Co., 11 BRBS 576 (1979), aff'd sub nom. Prolerized New England Co. v. Benefits Review Board, 12 BRBS 808, 637 F.2d 30 (1st Cir. 1980). See also Kicklighter v. Ceres Terminal, Inc., 13 BRBS 109, aff'd per curiam sub nom. Kicklighter v. Benefits Review Board, 665 F.2d 1040 (4th Cir. 1981).

II.

We now turn to whether the administrative law judge erried in finding that claimant suffered a 50 percent loss of wage-earning capacity as a result of the 1969 injury.

Section 8(c)(21) premises compensation

on 66 2/3 percent of the difference between claimant's average weekly wages at the time of the injury and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21). Wage-earning capacity must be determined pursuant to Section 8(h) of the Act, 33 U.S.C. §908(h), which provides in part thatpost-injury wage-earning capacity shall be determined by claimant's actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity. Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649 (1979). The administrative law judge explicitly determined that claimant's post-injury actual average weekly wage following the 1969 injury was not representative of claimant's post-injury wage-earning capacity. Without using any dollar figures, the administrative law judge recited the Section 8(h) factors and held that claimant suffered a 50 percent loss of wage-earning capacity. Decision and Order on Remand at 4.

Claimant's wage-earning capaicty should be expressed as a dollar figure, not as a percentage of claimant's pre-injury average weekly wage. Where the administrative law judge does express claimant's wage-earning capacity as a percentage of claimant's pre-injury average weekly wage, it may be inferred that the administrative law judge did not fully consider the relevant factors under Sections 8(c)(21) and 8(h). Cunningham v. Washington Gas Light Co., 12 BRBS 177 (1980); see Devillier; Feagin v. General Dynamics Corp., 10 BRBS 664 (1979). While use of a percentage figure for loss of wage-earning capacity creates such an inference, it does not per se constitute error if the record reflects that the administrative law judge fully considered the Section 8(h) factors. See Chatterton v. General Dynamics Corp., 12 BRBS 534 (1980).

While the administrative law judge should not have used a percentage figure for claimant's loss of wage-earning capacity, we conclude that the Decision and Order reflects

that the administrative law judge properly considered the Section 8(h) factors. Thus, any inference to the contrary has been rebutted. Moreover, since the facts in the record are sufficient for the percentage figure of loss of wage-earning capacity to be converted to a dollar figure, we need not remand to the administrative law judge for the mechanical computation of claimant's permanent partial disability award. Accordingly, we hold that the administrative law judge's determination of the extent of claimant's permanent partial disability due to the initial injury is supported by substantial evidence, is rational, and is in accordance with law, and must be affirmed. O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). Claimant's award for

permanent partial disability benefits is $58.66 per week.3/

III.

Where claimant suffers an injury which results in a permanent partial disability and subsequently suffers a second injury which results in a permanent total disability, claimant may receive concurrent awards for the two disabilities. Hastings v. Earth Satellite Corp., 14 BRBS 345, 628 F.2d 85 (D.C. Cir.), cert. denied, 101 S.Ct. 281

3/ This figure is based on $88, which is 50 percent of claimant's stipulated average weekly wage of $176 per week at the time of the 1969 injury. In making this calculation, we note that Section 8(h) requires that claimant's actual post-injury earnings should also be adjusted to represent the wages paid for the same work at the time of claimant's injury. This insures that wage-earning capacity is considered on an equal footing with the determination under Section 10 of average weekly wage "at the time of the injury." Drake v. General Dynamics Corp., 11 BRBS 288 (1979); Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649 (1979). Since the award for permanent partial disability benefits is computed on the basis that claimant's post-injury wage-earning capacity was exactly one half of his average weekly wage at the time of the 1969 injury, the wages were automatically on an equal footing with the Section 10 average weekly wages at the time of the injury. See Gillett v. Brady-Hamilton Stevedore Co., 13 BRBS 438 (1981). See also note 5, infra.

(1980). The major issue before the Board concerns the mechanics of calculating the concurrent awards.

The Director and claimant assert that the administrative law judge's use of a percentage apportionment for the award makes it impossible to calculate an award for claimant's permanent total disability. Claimant and the Director contend that the award for the permanent total disability benefits should be premised on claimant's average weekly wage at the time of the second injury and not on 1969 figures.

In the instant case, claimant had an average weekly wage of $176 a week at the time of the April 21, 1969, injury. Claimant suffered an $88 loss of wage-earning capacity as a result of his permanent partial disability. Claimant worked after the period of permanent partial disability for seven years. During that time, claimant's actual wages increased. Thus, at the time of the second injury, which left claimant permanently totally disabled,

claimant had an acutal average weekly wage of $294.38 per week.

The leading case on concurrent awards for permanent partial and subsequent permanent total disabilities is Hastings v. Earth Satellite Corp. In Hastings, the court affirmed the Board's determination that claimant's wages perior to the first injury should not be used as a basis for calculating claimant's award for the second injury.

> The Act bases benefit computations on the worker's 'average weelkly wages.' Section 8(a) of the Act, 33 U.S.C. §908(a) (1976), quoted in full in note 8 supra. The Act carefully defines that term. It provides, in pertinent part:
>
> > . . . [T]he average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation. . .
>
> Id. §10, 33 U.S.C. §910 (1976) (emphasis added). Where, as here, two injuries befall an employee, the employee's earning capacity during the time preceding the second injury must be the basis of computing benefits attributable to the second injury.

Hastings, 14 BRBS at 349, 628 F.2d at 90.

The relevant principle established in Hastings is that a permanent partial award for an initial injury can run concurrently with a permanent total award for a second injury; however, the compensation base for the permanent total award would be premised on claimant's average weekly wage "at the time of the [second] injury," 33 U.S.C. §910, i.e., claimant's remaining wage-earning capacity after the initial injury. The sum of the two awards would reflect the full diminution in claimant's earning capacity.

The Act provides that "the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation...." 33 U.S.C. §910. Where the Act's two formulas, Sections 10(a) and (b), for computing claimant's average weekly wage "cannot reasonably and fairly be applied, such average annual earnings shall be such sum as...shall

reasonably represent the annual earning capacity of the injured employee." 33 U.S.C. §908(c).4/ Neither Section 10(a) nor Section 10(b) of the Act reasonably represented Hastings' annual earning capacity at the time of the second injury. Thus, in accordance with Section 10(c) of the Act, the Hastings Court found that the average weekly wage in a second injury case represents the wage-earning capacity of the claimant which remains at the time of the second injury, i.e., the wage-earning capacity which remains after the first injury's effect on claimant's wage-earning capacity has been computed.

For the reasons stated infra, however, the facts in this case are unlike the facts and the assumed facts of Hastings: claimant's average weekly wage in this case is ascertainable by the use of claimant's actual wages at the time of the second injury. Claimant and Commercial Union stipulated at the hearing

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4/ "The average weekly wages of an employee shall be one fifty-second part of his average annual earnings." 33 U.S.C. §910(d).

that claimant's salary at the time of the second injury was $294.38 per week. Thus, claimant's award for permanent total disability is 66 2/3 percent of $294.38 per week. See Kicklighter v. Ceres Terminal, Inc., 13 BRBS 109, 118 n. 10, aff'd per curiam sub nom. Kicklighter v. Benefits Review Board, 665 F.2d 1040 (4th Cir. 1981). Commercial Union is liable for this amount for 104 weeks, after which the Special Fund assumes liability.

The second part of the question before us is whether claimant's award for the permanent partial disability should be adjusted to reflect claimant's greater award for permanent total disability benefits. In Hastings, the court indicated that an adjustment may be called for where the facts reflected that claimant's permanent partial disability was not as severe as was suggested by the facts at the time of onset of the disability. Claimant's increased wages at the time of second injury could be reflective of

claimant's loss of wage-earning capacity decreased from the time of the initial injury to the time of the subsequent injury.

When the administrative law judge in the instant case calculated claimant's award for permanent partial disability benefits, he explicitly determined that claimant's post-injury actual wages were not reflective of his wage-earning capacity. This conclusion is supported by substantial evidence in the record as a whole. Thus, while claimant's actual wages increased some time after the injury which gave rise to the permanent partial disability, it cannot be presumed that the mere fact that his wages increased is reflective of a proportionate decrease in the extent of claimant's permanent partial disability.

While the administrative law judge did not explicitly so state, it is apparent that he concluded that the instant claimant's loss of wage-earning capacity due to the first injury was largely attributable to the

difficulty he would have in getting a job on the open labor market. See Devillier v. National Steel & Shipbuilding Co., 10 BRBS 648 (1979); Hughes v. Litton Systems, Inc., 6 BRBS 301 (1977). See also Bath Iron Works Corp. v. White, 8 BRBS 818, 584 F.2d 569 (1st Cir. 1978). While his actual wages increased in the years after his first injury, this increase was, in part, due to his increased value in the particular job which he was performing.5/ His ability to earn

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5/ Claimant's wages following his first injury increased from 1969 to 1976. It is probable that a portion of this increase was due to an inflationary increase in general wage levels. See Devillier v. National Steel & Shipbuilding Co., 10 BRBS 648, 657 (1979). Adjustment for such inflationary increases is made through the requirement that comparison of pre and post-injury wage-earning capacity must be performed at the wage levels in existence at the time of the injury. Id.; see 33 U.S.C. §910. See, e.g., Drake v. General Dynamics Corp., 11 BRBS 288 (1979). But see McCabe v. Sun Shipbuilding & Dry Dock Co., 10 BRBS 614, 602 F.2d 59 (3d Cir. 1979). Thus, the increase in wages dealt with in this opinion is not the $206.38 increase alluded to above, but is the substantially smaller increase in wages which is not attributed to the inflationary increase in general wage levels that took place during the years from 1969 to 1976. See also note 3, supra.

wages in the open labor market remained the same. Thus, there is no need to adjust the permanent partial disability award in the instant case.6/

IV.

We now turn to Fireman Fund's request for a declaration of liability which would limit its liability to $70 a week pursuant to pre-amendment Section 6(b) with a $24,000 maximum.

The administrative law judge's award of $58.66 is less than the pre-amendment stautory ceiling of $70 a week; thus, there is no need to address the applicability of Section 6(b) to the instant case.

Pre-amendment Section 14(m) placed a $24,000 ceiling on the aggregate of a permanent partial disability award. This section was repealed in 1972. Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, §5(e),

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6/ Because of the unique nature of the facts presented in this case as outlined above, our holding regarding the assessment of liability is limited to the facts of this case.

86 Stat. 1254 (1972). The repeal of Section 14(m) applies retroactively to awards for pre-amendment injuries that had not reached the statutory ceiling before the effective date of the 1972 amendments. Hastings v. Earth Satellite Corp., 14 BRBS 345, 628 F.2d 85 (D.C. Cir.) cert denied, 101 S. Ct. 281 (1980). The award in the instant case did not reach the statutory ceiling prior to the effective date of the 1972 amendments. Accordingly, claimant is not bound to the pre-amendment $24,000 statutory ceiling. Argonaut Insurance Company v. Director, OWCP, 13 BRBS 297., F.2d , No. 80-1570 (1st Cir. April 24, 1981); Hastings; Davis v. United States Department of Labor, Nos. 78-2257 & -2291 (D.C. Cir. December 22, 1980); Avondale Shipyards, Inc. v. Vinson, 12 BRBS 478, 623 F.2d 1117 (5th Cir. 1980).

V.

The final issue before us is claimant's petition requesting an attorney's fee. Claimant's attorney requests a total of

$3,699.53. This amount includes $1,279.00, the amount remaining to be paid for work performed before the administrative law judge in the first hearing.7/ Claimant also requests $560.53 for costs incurred before the administrative law judge, but not included in the administrative law judge's award of an attorney's fee. An additional $1,860 is requested for work performed in connection with the two appeals to the Board. Claimant's fee petition states that the attorney's usual fee for this type of work is $60 per hour.

Fireman's Fund has objected to the $560.63 in costs, contending that the fee awarded by the administrative law judge included costs.

We turn first to the requests for

7/ As noted infra, the administrative law juddge awarded a total of $2,558.00 for work before him. Fireman's Fund has paid $1,279.00, which represents one-half of the amount awarded.

$560.23 for costs incurred at the first administrative law judge hearing, but allegedly not included in the administrative law judge's award of claimant's attorney's fee, and for the $1,279.00 awarded by the administrative law judge, but not paid by Commercial Union. Claimant has raised this issue for the first time in his second appeal to the Board. Claimant, as a party-in-interest, may file an appeal in any proceeding in which he is adversely affected, White v. Ingalls Shipbuilding Division, 12 BRBS 908 (1980); however, the authority to file an appeal does not confer the right to raise new issues out of time. Pilkington v. Sun Shipbuilding & Dry Dock Co., 9 BRBS 473 (1978). Accordingly, we will not consider this issue.

Claimant has also petitioned the Board for a fee of $1,860 for thirty hours of work. This amount includes twenty eight and one half hours for work performed at the Board level and three and three quarter hours of work

performed at the administrative law judge level before the Decision and Order and Decision and Order on Remand were issued. The attorney's fee for the three and three quarter hours of work performed before the administrative law judge must be approved at the level where the services were performed. See Revoir v. General Dynamics Corp., 12 BRBS 524 (1980); Owens v. Newport News Shipbuilding & Dry Dock Co., 11 BRBS 409 (1979). Claimant should submit a fee application for this portion of the work to the administrative law judge.

Claimant's attorney's fee request properly includes twenty eight and one half hours for work performed before the Board. Eighteen and one quarter hours are for work performed in the first appeal to the Board. Ten and one quarter hours are for work performed in the second appeal to the Board.

Fireman's Fund has deferred to the Board for a determination of the propriety and reasonableness of the requested fee.

Neither Commercial Union nor the Director responded to the claimant's attorney's fee request.

Claimant's attorney's briefs failed to adequately discuss the issues before the Board. Accordingly, due to the limited value of claimant's attorney's briefs, we award claimant $1,350 for an attorney's fee for work performed on the appeals to the Board.

The Decision and Order After Remand is hereby affirmed. Fireman's Fund is liable for claimant's continuing permanent partial disability benefits at the rate of $58.66 per week. Commercial Union is liable for 104 weeks of compensation for claimant's permanent total disability at the rate of $196.23 per week. Thereafter, liability for the claimant's compensation for his permanent total disability falls on the Special Fund. 33 U.S.C. §908(f). Claiamnt is awarded $1,350.00 as an attorney's fee for work performed before the Board, for which

Fireman's Fund and Commercial Union are jointly and severally liable.

SO ORDERED.

/s/
JULIUS MILLER
Administrative Appeals Judge

We Concur:

/s/
ROBERT L. RAMSEY, Chief
Administrative Appeals Judge

/s/
ISMENE M. KALARIS
Administrative Appeals Judge

Dated this 29th
day of March 1982

APPENDIX E

MEMORANDUM & JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
AUG 25 1983
PHILLIP B. WINBERRY
Clerk, U. S. Court of Appeals

MARINE CORPS EXCHANGE; COMMERCIAL UNION INSURANCE COMPANY, Petitioners, vs. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS and ELTON MORGAN, Respondents.	CA No. 82-7263 MEMORANDUM

On Petition for Review of an Order
of the Benefits Review Board
Argued and submitted February 8, 1983

Before: HUG and CANBY, Circuit Judges, and ORRICK,* District Judge

Insurer Commercial Union seeks review of a decision of the Benefits Review Board. We affirm.

*Honorable William H. Orrick, Jr., United States District Judge for the Northern District of California, sitting by designation.

Commercial Union first contends that no substantial evidence supports the finding that the 1976 incident was an "injury" for purposes of the Longshoremen's Act. The testimony of Dr. Segal, however, provides substantial support for the finding that the incident was an "aggravation" of a previous injury. Such an aggravation is a compensable injury under the Act. C & P Telephone Co. v. Director, 564 F.2d 503 (D.C. Cir. 1977); Great Atlantic & Pacific Tea Co. v. Cardillo, 127 F.2d 334 (D.C. Cir. 1942).

Commercial Union next argues that the Administrative Law Judge erred in finding that claimant Morgan was only fifty percent disabled by the 1969 injury because Morgan retained no wage-earning capacity on the open market. A worker's value on the open labor market, however, is only one factor in determining wage earning capacity. 33 U.S.C. §908(h). Morgan's duties included administrative functions. The record clearly supports an inference that Morgan's

efforts produced some benefit for his employer. The finding that Morgan retained fifty percent of his wage-earning capacity after the 1969 injury thus finds substantial support in the record.

Finally, Commercial Union argues that the Board erred in awarding Morgan a total permanent disability award for the 1976 injury based on his full 1976 salary. Since the 1969 injury resulted in a fifty percent loss in earning capacity, Commercial Union asserts that the 1976 benefits should be based on only half of Morgan's 1976 salary. We believe that the Review Board applied the proper standards.

Although Commercial Union was liable only for the decrease in earning capacity attributable to the 1976 injury, 33 U.S.C. §908(f), the two injuries were separate incidents. The Review Board properly considered them separately. The 1969 injury produced a fifty percent reduction in Morgan's earning capacity at that

time. By 1976, however, Morgan had received several raises. His duties had changed. His services may well have become more valuable despite his injury. Thus, a new determination of earning capacity was required in order to compute the benefits payable for the 1976 injury. The Review Board found that Morgan's 1976 wages accurately reflected his 1976 wage-earning capacity. Earning capacity is normally determined by actual salary. 33 U.S.C. §§908-910. Morgan's 1976 salary certainly provides substantial support for a finding of his earning capacity. The permanent total disability award was therefore correctly based on Morgan's full 1976 salary.

The decision of the Benefits Review Board is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARINE CORPS EXCHANGE; COMMERCIAL UNION INSURANCE COMPANY,	
Petitioners,	BRB# 77-412, OWCP # 13-46024
vs	
	No. 82-7263
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS	JUDGMENT
and	SOUTHERN CALIFORNIA
ELTON MORGAN,	
Respondents,	

Upon Petition to Review a Decision of the Benefits Review Board of the United States

This Cause came on to be heard on the Transcript of the Record from the Benefits Review Board of the United States on February 8, 1983 and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Decision of said Benefits Review Board of the United States in this Cause be, and hereby is AFFIRMED.

Filed and entered: AUGUST 25, 1983.